

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRISONERS LEGAL)
ADVOCACY NETWORK,)
)
 Plaintiff,) C.A. No. 23-1397-JLH
)
v.)
)
CARNEY, et al.,)
)
 Defendants.)

Friday, April 19, 2024
1:00 p.m.
Courtroom 6C

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JENNIFER L. HALL
United States District Court Judge

APPEARANCES:

ACLU OF DELAWARE
BY: DWAYNE J. BENSING, ESQ.
BY: ANDREW BERNSTEIN, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2
3 DELAWARE DEPARTMENT OF JUSTICE,
4 BY: LYNN KELLY, ESQ.
5 BY: KENNETH WAN, ESQ.

6 Counsel for the Defendant
7
8 -----

12:59:47 8
12:59:47 9 COURT CLERK: All rise. The United States
12:59:48 10 District Court for the District of Delaware is now in
12:59:51 11 session. The Honorable Jennifer L. Hall presiding.

12:59:54 12 THE COURT: Hi, everyone. Please be seated.
12:59:58 13 All right. We're here in courtroom 6C because Judge Fallon
13:00:03 14 is picking a jury in courtroom 6D for my trial next week, so
13:00:07 15 we're playing musical courtrooms a little bit.

13:00:10 16 We're here today to hear oral argument on a
13:00:13 17 motion for a preliminary injunction. This is Prisoners
13:00:17 18 Legal Advocacy Network versus Carney, et al., civil action
13:00:22 19 number 23-1397.

13:00:24 20 Let's go ahead and put our appearances on the
13:00:26 21 record and we'll start with plaintiff.

13:00:31 22 MR. BERNSTEIN: Good afternoon, Your Honor.
13:00:31 23 Andrew Bernstein from ACLU Delaware here on behalf of
13:00:40 24 plaintiff.

13:00:41 25 THE COURT: Good afternoon. Welcome. All

13:00:46 1 right. And for defendants.

13:00:46 2 MS. KELLY: Good afternoon, Your Honor. Lynn

13:00:48 3 Kelly from the Department of Justice on behalf of the

13:00:49 4 defendants. At counsel table with me is Kenneth Wan from

13:00:53 5 the Department of Justice as well.

13:00:55 6 THE COURT: All right. Good to see everybody.

13:00:57 7 I see a lot of familiar faces in the room today. Okay. I

13:01:00 8 can tell you we've taken a look at the papers. I think we

13:01:03 9 understand what the arguments are. This is your chance to

13:01:06 10 add anything to the arguments you made in your briefings and

13:01:10 11 we also have some questions as well.

13:01:12 12 Let's hear from the movant.

13:01:20 13 MR. BERNSTEIN: Thank you, Your Honor. May it

13:01:28 14 please the Court.

13:01:29 15 Your Honor, we are here because some of the most

13:01:32 16 vulnerable Delawareans --

13:01:33 17 (Court reporter clarification.)

13:01:33 18 MR. BERNSTEIN: Is that better?

13:01:44 19 Your Honor, we are here because some of the most

13:01:47 20 vulnerable Delawareans are at risk of losing their most

13:01:52 21 fundamental right and being totally disenfranchised in the

13:01:52 22 rapidly approaching 2025 general election. More

13:01:56 23 specifically, I am here representing the Prisoners Legal

13:01:59 24 Advocacy Network. PLAN is an organization that has

13:02:01 25 dedicated time and resources towards advancing the voting

rights of incarcerated Delawareans. PLAN is composed of incarcerated legal service recipients who wish to vote in 2024 and jailhouse lawyers and prison paralegals who wish to assist those voters in casting ballots and are currently unable to do so. More than 1,000 Delawareans on pre-trial detention or serving misdemeanor convictions are likely facing total disenfranchisement, including PLAN members.

Defendants acknowledge these citizens retain their voting right. However, they plan to only offer these voters unlawful absentee ballots. Delaware law is clear. Article V, Section 4A of the Delaware Constitution is a comprehensive list of those eligible to cast an absentee ballot. Article V, Section 4A does not include incarcerated voters among voters eligible to cast these ballots.

(Court reporter clarification.)

MR. BERNSTEIN: Would you like me to start over from the beginning?

THE COURT: No. We're good.

MR. BERNSTEIN: Because these voters are not being offered any option to vote other than absentee ballots, they are facing total disenfranchisement offending the fundamental right to vote and constitute an unconstitutional discrimination under the Equal Protection Clause. This total disenfranchisement constitutes a harm to the public interest and an irreparable injury that is

13:03:52 1 greater than any interest the state has put forward at this
13:03:57 2 time that it may shoulder by remedying it.

13:03:57 3 We respectfully ask this Court to grant our
13:04:01 4 motion for a preliminary injunction and mandate in-person
13:04:02 5 voting opportunities to be provided to incarcerated
13:04:05 6 Delawareans.

13:04:06 7 Your Honor, I can field any questions you may
13:04:08 8 have, otherwise I am prepared to proceed with my argument.

13:04:10 9 THE COURT: Why don't you go ahead and I'll ask
13:04:13 10 the questions as they come up.

13:04:15 11 MR. BERNSTEIN: I will start, Your Honor, with
13:04:19 12 the likelihood of the success on the merits prong of the
13:04:23 13 preliminary injunction standard with the right to vote
13:04:24 14 claim. The Supreme Court has made clear that the
13:04:26 15 fundamental right to vote applies with equal force to
13:04:30 16 incarcerated individuals.

13:04:31 17 THE COURT: Okay. That's not disputed by
13:04:34 18 defendants.

13:04:34 19 MR. BERNSTEIN: Yes, undisputed in this matter.
13:04:37 20 And also undisputed in this matter is the *Anderson* verdict
13:04:42 21 framework is the analysis that applies to this fundamental
13:04:45 22 right to vote claim. The *Anderson* verdict framework
13:04:48 23 requires that balancing the State's interest put forward
13:04:51 24 imposing an infringement against the character and magnitude
13:04:55 25 of the infringement put forward. Under the Third Circuit

13:04:57 1 *Mazzo* case, it has been found that a severe burden makes a
13:05:02 2 case subject to strict scrutiny. And the Supreme Court has
13:05:07 3 also found, in cases such as *Rosario*, that instances of
13:05:11 4 total disenfranchisement constitute the severe burden.

13:05:16 5 THE COURT: Now, that, I guess, is what the
13:05:17 6 dispute is here is has there been a total
13:05:22 7 disenfranchisement? Right? They don't dispute that a total
13:05:26 8 disenfranchisement would be a severe burden, but they're
13:05:28 9 saying there has not been a denial of the right to vote and
13:05:31 10 there won't be. That's the dispute.

13:05:33 11 MR. BERNSTEIN: Your Honor, yes, that is a
13:05:35 12 dispute here.

13:05:38 13 THE COURT: Let me ask you. Has there been any
13:05:41 14 indication from the Delaware Supreme Court, any Delaware
13:05:46 15 official or any case or judge in Delaware that suggests that
13:05:52 16 the prisoners may not file absentee ballots.

13:05:57 17 MR. BERNSTEIN: Your Honor, we have the text of
13:06:01 18 *Higgin III*, which states that the text of Article V Section
13:06:05 19 4A is exhaustive. Those categories cannot be enlarged or
13:06:11 20 expanded upon in any way. Nowhere in that text will you
13:06:15 21 find an excuse for incarcerated voters to cast an absentee
13:06:19 22 ballot.

13:06:20 23 THE COURT: Okay. I don't think they dispute
13:06:21 24 that the categories are what they are. The real dispute is
13:06:25 25 whether or not a prisoner falls under one of the Delaware

13:06:29 1 constitutional and statutory categories. That's the
13:06:33 2 dispute, right?

13:06:34 3 MR. BERNSTEIN: Yes, Your Honor, that is a
13:06:37 4 dispute. But expanding -- taking any of the enumerated
13:06:44 5 categories in Article 5 Section 4A, it would be quite a
13:06:48 6 stretch to fit incarceration under any of those enumerated
13:06:52 7 exceptions. We have the text of *Higgin III* itself which
13:06:56 8 uses the phrase "workforce" to refer to the business for
13:06:59 9 occupation exception and there are replete examples within
13:07:04 10 the Delaware statutory code of people who are incarcerated
13:07:08 11 not being considered part of the workforce, goes against
13:07:12 12 common usage of the term.

13:07:13 13 And furthermore, there's just nothing in the
13:07:18 14 *Higgin* opinion that would suggest that -- that would suggest
13:07:22 15 that the State can't expand the text of those categories.

13:07:26 16 THE COURT: But at the end of the day, let me
13:07:29 17 back up to my question right before that. Which is, is
13:07:33 18 there anyone besides the plaintiff in this case that has
13:07:39 19 suggested or is suggesting that a prisoner doesn't fall
13:07:44 20 under the occupation or business exception? Is there
13:07:47 21 anything out there that makes you worried about that?
13:07:50 22 You're saying that's true. Is there anybody else from
13:07:52 23 Delaware saying that's true?

13:07:55 24 MR. BERNSTEIN: Your Honor, to our knowledge,
13:07:58 25 there are no pending cases or challenges to that effect.

13:08:04 1 But what there is is there is an increasing trend of
13:08:07 2 challenges to voters who wish to cast ballots, the
13:08:12 3 increasing trend of criminalization of voting and that has
13:08:16 4 created a chilling effect across the country with regard
13:08:19 5 to --

13:08:20 6 THE COURT: Have there been any such prosecution
13:08:21 7 is in the State of Delaware?

13:08:23 8 MR. BERNSTEIN: To our knowledge, Your Honor,
13:08:26 9 no, there have not been.

13:08:27 10 THE COURT: Let me ask you, what Delaware state
13:08:32 11 statute are your members of the association worried about
13:08:36 12 getting charged with?

13:08:38 13 MR. BERNSTEIN: Your Honor, there are two
13:08:39 14 statutes, one regarding two challenges to absentee ballots
13:08:45 15 and the other regarding the prosecutions.

13:08:47 16 THE COURT: Let's talk about the prosecution one
13:08:48 17 first.

13:08:49 18 MR. BERNSTEIN: Yes, Your Honor. That is Title
13:08:51 19 15 Section 5128 of the Delaware Code, fraudulent voting
13:08:56 20 statute. I can produce a copy of the statute.

13:09:01 21 THE COURT: I have it. Which element? Which
13:09:04 22 subsection?

13:09:04 23 MR. BERNSTEIN: Subsection 7.

13:09:06 24 THE COURT: Knowingly, willfully or fraudulently
13:09:09 25 does any unlawful act to secure an opportunity for himself

13:09:13 1 or herself or for any person to vote. So you're saying that
13:09:18 2 the Delaware attorney general would prosecute a prisoner for
13:09:28 3 just applying for an absentee ballot and what would be --
13:09:33 4 it's hard to imagine that conduct fitting under that section
13:09:38 5 of the statute. Can you explain to me why there's a real
13:09:42 6 worry?

13:09:43 7 MR. BERNSTEIN: Your Honor, I would respectfully
13:09:45 8 disagree that there is -- that it's speculation to think
13:09:51 9 that a voter could be charged under there. We understand
13:09:55 10 the representations of the attorney general in this matter
13:09:59 11 that they do not have plans to prosecute, but there have
13:10:02 12 been instances across the country where voters have been
13:10:06 13 told that they would not be prosecuted by state officials
13:10:08 14 and were prosecuted anyway.

13:10:10 15 THE COURT: Those were for prisoners who weren't
13:10:13 16 eligible to vote getting prosecuted for trying to vote when
13:10:16 17 they weren't allowed to vote. Here the voters are eligible
13:10:20 18 to vote, right? Your argument is that it's illegal for them
13:10:23 19 to vote because the Delaware statute allowing them to vote
13:10:28 20 is unconstitutional under Delaware law or that it's not --
13:10:33 21 that the attorney general shouldn't be accepting the
13:10:36 22 absentee ballots because that's unconstitutional under
13:10:40 23 Delaware law. That's a different, isn't it?

13:10:45 24 MR. BERNSTEIN: Your Honor, the issue is the
13:10:48 25 eligibility to cast the ballot. No one disputes that

13:10:52 1 incarcerated individuals retain their voter's rights. But
13:10:56 2 when it comes to who is eligible to cast an absentee ballot,
13:11:01 3 that is disputed and it is the case here that incarcerated
13:11:07 4 voters harbor fears regarding their ability to cast a ballot
13:11:11 5 under the Delaware constitution knowing statutes like this
13:11:15 6 are on the books that could plausibly apply to them. And
13:11:18 7 that extends also to PLAN's prison paralegals, jailhouse
13:11:25 8 lawyers who also potentially under this statute could fear
13:11:28 9 what might -- the potential ramifications of helping an
13:11:32 10 incarcerated voter who is ineligible to cast an absentee
13:11:36 11 ballot cast that ballot.

13:11:38 12 THE COURT: How did the attorney general or her
13:11:42 13 designee possibly prove that a prisoner or jailhouse
13:11:47 14 paralegal knowingly, willfully or fraudulently, unlawfully
13:11:50 15 helped someone or themselves submitted an absentee ballot?
13:11:56 16 If the attorney -- the application to get the absentee
13:12:01 17 ballot was approved by the attorney general and it's got a
13:12:04 18 check box for I'm currently incarcerated, how is that person
13:12:08 19 knowingly doing an unlawful act to secure their vote?

13:12:15 20 MR. BERNSTEIN: Your Honor, to the extent that
13:12:19 21 the jailhouse lawyers and prison paralegals are aware of the
13:12:24 22 *Higgin* decision, they would have to weigh the text of the
13:12:27 23 *Higgin* decision on one hand against the pronouncement of the
13:12:29 24 attorney general on the other hand and may make a decision
13:12:33 25 regarding whether or not they're able to continue with their

13:12:35 1 regular duties as members of the PLAN's organization. This
13:12:41 2 is a burden on both the voters, who might be aware here of
13:12:46 3 the *Higgin* decision and the attorney general pronouncement.
13:12:48 4 It's a burden on the jailhouse lawyers and prison paralegals
13:12:53 5 as well. And this kind of chilling effect is produced not
13:12:59 6 only by the statute we've been talking about, but it's also
13:13:04 7 produced by the absentee ballot challenge statute.

13:13:09 8 Defendants do not contest that the ballot challenges can be
13:13:14 9 brought on an unlimited basis, that there's no limit to how
13:13:18 10 many ballots can be challenged here. The absentee ballot
13:13:21 11 provision or Title 15 Section 5513 states that absentee
13:13:27 12 ballots can be challenged to the same extent that a regular
13:13:30 13 ballot can be challenged.

13:13:32 14 THE COURT: And we've looked at that. We
13:13:34 15 couldn't figure out to what extent a regular ballot can be
13:13:36 16 challenged. Can you walk us through what the ballot
13:13:39 17 challenge process is because that's not something I'm
13:13:43 18 familiar with?

13:13:43 19 MR. BERNSTEIN: My understanding, and this is
13:13:46 20 maybe a better question for defendants here, because I also
13:13:50 21 found that confusing, is that the ballot challenge typically
13:13:55 22 would relate to someone's eligibility to cast a ballot and
13:13:59 23 with regard to the actual mechanics of it. I don't know as
13:14:03 24 much on that end.

13:14:04 25 THE COURT: Okay. And the reason why I'm asking

13:14:06 1 is, I guess I'm wondering if a ballot gets challenged and
13:14:11 2 challenges this person shouldn't be casting an absentee
13:14:15 3 ballot because notwithstanding it's said on the absentee
13:14:20 4 ballot form that they're casting it because they're
13:14:24 5 incarcerated, but notwithstanding that, but because
13:14:27 6 prisoners shouldn't be casting absentee ballots, then would
13:14:32 7 there be an opportunity for the prisoner or somebody to try
13:14:35 8 to vindicate the right of the prisoner to vote and make -- I
13:14:40 9 guess you may not know the answer to that if you don't know
13:14:42 10 what the process is. Maybe we can hear that from the state.

13:14:45 11 MR. BERNSTEIN: Yeah, Your Honor, I do not know.

13:14:48 12 THE COURT: Okay. Let me ask you this. Reading
13:14:57 13 your complaint as well as the preliminary junction motion,
13:15:02 14 the remedy that your after is for the State to provide
13:15:07 15 voting machines at the prison, is that right?

13:15:09 16 MR. BERNSTEIN: Your Honor, any in-person voting
13:15:13 17 opportunity would, in our clients' mind, resolve the
13:15:17 18 constitutional issue at hand. In person voting machines
13:15:25 19 being implemented in DDOC, Delaware Department of Correction
13:15:27 20 facilities, has been the primary suggested relief here in
13:15:34 21 large part because it's been proven workable in other
13:15:37 22 jurisdictions. Since the filing of the last paper in this
13:15:42 23 argument, an additional jurisdiction has implemented
13:15:47 24 in-person voting in its facility, so the total is now five
13:15:51 25 states and Washington, D.C., having voting in at least some

13:15:57 1 of their facilities. At those jurisdictions that have those
13:16:01 2 mechanisms in place serve larger populations, in some
13:16:08 3 instances, than are incarcerated in all of Delaware. For
13:16:12 4 example, more individuals voted in the Cook County prison
13:16:16 5 locations than there would be eligible Delawareans
13:16:19 6 incarcerated to vote. So that's been suggested primarily
13:16:24 7 due to its proven workability in other jurisdictions.

13:16:27 8 THE COURT: I'm wondering if your comment about
13:16:31 9 there may not be that many prisoners in Delaware as an
13:16:36 10 absolute number that would be able to take advantage of
13:16:38 11 this, because there just aren't as many pretrial detainees
13:16:42 12 and convicted misdemeanor defendants in the prison during
13:16:47 13 the election as there are in other districts. Doesn't that
13:16:51 14 cut against the Court ordering a remedy of in person? If I
13:16:55 15 agreed with you that as a matter of state law absentee
13:17:00 16 ballots by pretrial detainees are prohibited, why couldn't
13:17:09 17 the remedy I order be that the state has to give the
13:17:13 18 prisoners absentee ballots?

13:17:16 19 MR. BERNSTEIN: Your Honor, if I don't address
13:17:20 20 the entire question, I want to make sure I address every
13:17:23 21 point, so let me know.

13:17:24 22 THE COURT: Right.

13:17:24 23 MR. BERNSTEIN: But the *O'Brien* case, I think is
13:17:29 24 on point here in the sense that the there the state supreme
13:17:35 25 court made a pronouncement regarding who was eligible to

13:17:38 1 vote under absentee laws and then the Supreme Court of the
13:17:44 2 United States, in their opinion, said it was not their
13:17:47 3 function to construe those laws differently. Here, we have
13:17:52 4 a definitive construction of Article 5 Section 4A that at
13:17:58 5 this point this court is obligated to follow, that the
13:18:04 6 categories are what they are, they cannot be expanded upon
13:18:06 7 or enlarged in any way and that none of the categories --
13:18:11 8 and that the categories should be given a reading that
13:18:14 9 sticks to the text, that sticks to what the common
13:18:19 10 understanding or historical understanding of what those
13:18:23 11 categories would be, which is laid out in *Higgin*.

13:18:26 12 Your Honor, there was a second part to your
13:18:28 13 question that I'm going to get to. Apologies.

13:18:31 14 Regarding the cutting against our client perhaps
13:18:36 15 that there aren't as many people who would be eligible
13:18:40 16 voters in this jurisdiction, the case law is clear the right
13:18:43 17 to vote is an individual right. The *Frank v. Walker* case
13:18:47 18 that was cited in the briefing has great language to that
13:18:51 19 effect, that even if 99% of those voters aren't eligible to
13:18:57 20 cast a ballot are not included, that there's still -- this
13:19:01 21 court is still obligated to implement remedies and resolve
13:19:05 22 disputes regarding the fundamental right to vote for that
13:19:08 23 remaining 1%.

13:19:09 24 THE COURT: And I appreciate your comments. I
13:19:13 25 guess what I was more thinking of, if there aren't that many

13:19:16 1 people that are going to be voting at the prison, shouldn't
13:19:21 2 the Court take into account the State's interests in how
13:19:27 3 much it's going to cost when determining what remedy to
13:19:31 4 order, whether the Court orders absentee ballots be given
13:19:35 5 versus in-person voting. But I want to go back to what you
13:19:40 6 said right after that, which is I think I heard you say that
13:19:46 7 the only relief the Court can order is in-person voting.
13:19:50 8 The Court couldn't remedy an alleged constitutional
13:19:53 9 violation by ordering the State to provide some other means
13:19:57 10 of voting, including absentee ballots? The federal court
13:20:03 11 can't order the state to do that.

13:20:04 12 THE COURT: My understanding from the *O'Brien*
13:20:06 13 case, Your Honor, is that the Supreme Court decided in that
13:20:13 14 instance that the state supreme court was the final arbiter
13:20:18 15 of what state law was. And here we have a similar
13:20:22 16 determination that has occurred where the Court in *Higgin*
13:20:25 17 *III* made a final determination regarding the Delaware
13:20:27 18 constitution. The remedy simply has to comply with the
13:20:33 19 Delaware Supreme Court's understanding of the Delaware
13:20:36 20 constitution is my understanding of *O'Brien*.

13:20:41 21 THE COURT: All right. Okay. Anything else you
13:20:45 22 wanted to add before we here from the other side?

13:20:47 23 MR. BERNSTEIN: Your Honor, I would just also
13:20:51 24 add, just I think this was addressed in defendant's briefing
13:20:56 25 and we touched on it briefly on a reply, but to the extent

13:21:01 1 that standing concerns have been brought up in this matter,
13:21:05 2 I would just like to make it clear now that PLAN asserts
13:21:10 3 standing under multiple theories of standing, organizational
13:21:14 4 and associational. They've spent resources on this issue,
13:21:17 5 they have members who are currently estopped from doing
13:21:21 6 there work under the association theory, so I just wanted to
13:21:25 7 make that clear.

13:21:26 8 THE COURT: And I appreciate you bringing up
13:21:28 9 standing, because I understand your point about that you say
13:21:35 10 there's enough here in terms of is the right plaintiff
13:21:39 11 before the Court. There are -- we take, for purposes of the
13:21:42 12 argument, that PLAN has members that want to vote and want
13:21:47 13 to vote from prison and so there's this question about
13:21:51 14 whether or not they can vote if they're not allowed absentee
13:21:54 15 votes.

13:21:55 16 There's another aspect of standing, though, that
13:21:58 17 requires that there be an imminent injury. And I'm
13:22:04 18 wondering if that's been met here given that the attorney
13:22:07 19 general has said that they don't plan to prosecute prisoners
13:22:12 20 that attempt to vote absentee as well as all indications are
13:22:18 21 that the absentee application is going to have a check box
13:22:22 22 for prisoners, suggesting that the State plans to provide
13:22:25 23 this opportunity. There's no indications, at least I
13:22:28 24 haven't heard any, that they're not going to.

13:22:31 25 MR. BERNSTEIN: Your Honor, I would respectfully

13:22:35 1 point you towards the jailhouse lawyers and prison
13:22:38 2 paralegals who are currently impeded from doing work, that
13:22:42 3 there whole function regarding securing the right to vote of
13:22:46 4 other incarcerated individuals is changed from helping
13:22:50 5 people understand what their rights are -- sorry -- from
13:22:53 6 helping people prepare to cast ballots to helping people
13:22:56 7 understand that there is this confusion now.

13:22:58 8 THE COURT: So the person telling -- I just want
13:23:01 9 to make sure. The people that are telling prisoners they
13:23:04 10 can't vote, that's coming from your side, not from their
13:23:07 11 side, right?

13:23:08 12 MR. BERNSTEIN: Your Honor, the people
13:23:13 13 explaining the current situation, the landscape how the
13:23:16 14 right to vote is unstable, how they might not have a right
13:23:19 15 to vote, that is coming from from PLAN.

13:23:23 16 THE COURT: So that injury is not traceable to
13:23:25 17 those defendants that are before the Court today, right?

13:23:29 18 MR. BERNSTEIN: Your Honor, I would disagree and
13:23:31 19 say that there wouldn't be a need for that kind of
13:23:35 20 corrective messaging if the State hadn't refused to
13:23:40 21 implement a constitutional guarantee mechanism of voting.

13:23:45 22 THE COURT: Thank you very much.

13:23:47 23 MR. BERNSTEIN: Thank you.

13:23:57 24 MS. KELLY: Good afternoon again, Your Honor.
13:23:59 25 Lynn Kelly on behalf of the defendants.

13:24:02 1 May it please the Court, Your Honor, defendants
13:24:05 2 respond in opposition of the motion for preliminary
13:24:08 3 injunction and the temporary restraining order requested by
13:24:13 4 this court.

13:24:13 5 Just a little bit of factual background. It
13:24:16 6 appears that the Court has certainly reviewed all the
13:24:18 7 documents submitted by the parties, but I would just like to
13:24:21 8 highlight some of the facts that were submitted by the
13:24:26 9 commissioner of the department of elections and the
13:24:29 10 commissioner of the department of corrections.

13:24:32 11 Specifically, I think the Commissioner Albence stated that
13:24:38 12 the department of elections has for 40 years under elections
13:24:41 13 policy provided absentee voting to eligible incarcerated
13:24:47 14 people, either through -- definitely by the absentee ballot,
13:24:53 15 but either under the physical disability exception or
13:24:57 16 business and occupation exception under the constitution.

13:25:03 17 In 2018 that absentee ballot became -- it was
13:25:09 18 essentially drafted so that the business or occupation
13:25:12 19 reason included otherwise eligible persons who are
13:25:16 20 incarcerated and it has continued since 2018. Both
13:25:24 21 commissioners confirm that the agencies have worked together
13:25:28 22 to educate not only the staff, but educate the eligible
13:25:33 23 incarcerated people on the absentee ballot how to go about
13:25:39 24 getting that.

13:25:40 25 THE COURT: The State agrees that eligible

13:25:43 1 incarcerated people have the right to vote unless they're
13:25:48 2 precluded by some other conviction or something like that?

13:25:53 3 MS. KELLY: Yes, Your Honor, I think that
13:25:55 4 eligible incarcerated -- I say eligible, I mean --

13:25:59 5 THE COURT: They're not convicted of a felony
13:26:01 6 that disqualifies them from voting.

13:26:03 7 MS. KELLY: That's right.

13:26:04 8 THE COURT: There's no dispute here that these
13:26:07 9 people have the right to vote.

13:26:09 10 MS. KELLY: No, that's correct, Your Honor. I
13:26:11 11 believe it's convicted misdemeanor and pretrial detainees.
13:26:14 12 When I say eligible incarcerated people, those are who I'm
13:26:18 13 talking about. And I think Commissioner Albence's
13:26:22 14 declaration also makes clear that the harm to the State
13:26:25 15 should the Court award in-person voting is that \$1 million
13:26:30 16 per election cost as well as the cost of resources to staff
13:26:34 17 that in-person voting as well.

13:26:36 18 I think it's important, before I get into
13:26:39 19 argument, just to --

13:26:41 20 THE COURT: Is it the State's position, if I
13:26:42 21 agreed with them that the *Higgin* decision absolutely barred
13:26:51 22 incarcerated misdemeanor defendants and pretrial detainees
13:27:00 23 from voting absentee because that's unconstitutional under
13:27:07 24 the state constitution, is it the State's position that the
13:27:10 25 federal court could not order the State to provide absentee

13:27:13 1 ballots and that that would remedy the constitutional
13:27:17 2 violation?

13:27:22 3 MS. KELLY: I think it --

13:27:25 4 THE COURT: Put another way, the plaintiff is
13:27:27 5 saying the only thing I could order is in-person voting in
13:27:31 6 some way. Would you disagree with that?

13:27:34 7 MS. KELLY: I absolutely disagree with that. I
13:27:37 8 disagree with it -- first of all, this is a case of first
13:27:42 9 impression. *Higgin* did not deal with this issue. *Higgin*
13:27:45 10 has a couple of holdings that I think one of the holdings
13:27:49 11 plaintiff focus on in this case before you, but it's not --
13:27:54 12 it's a case of first impression. So I absolutely think that
13:27:57 13 for the Court to look at this the first time today and say,
13:28:03 14 well, I have a question about constitutionality, but we're
13:28:06 15 going to award absentee voting to this group of people,
13:28:10 16 absolutely. I don't think the only -- I don't think that's
13:28:14 17 the only option. I think the other option potentially could
13:28:19 18 be to have these people petition for a bail review and be
13:28:24 19 permitted to go before the in-person voting to be escorted,
13:28:32 20 however -- that has never been explored. Other options of
13:28:36 21 voting has never been explored before, because it hasn't had
13:28:41 22 to be. I hope I answered the Court's question.

13:28:46 23 THE COURT: No. I think my question -- I
13:28:48 24 appreciate that. I think my question is convoluted, but
13:28:51 25 basically what I'm saying, the plaintiff is saying if I find

13:28:55 1 that there was a constitutional violation, just assuming
13:28:58 2 that that's the case, am I restricted in what type of remedy
13:29:02 3 I can order to stop that constitutional violation? Am I
13:29:08 4 restricted by the Delaware state constitution that says, no
13:29:13 5 absentee ballot voting by prisoners, if they're right that
13:29:17 6 that's what it says, or can I say, no, yes absentee voting
13:29:22 7 by prisoners, I don't care what the Delaware constitution
13:29:25 8 says if it says that it's unconstitutional.

13:29:28 9 MS. KELLY: I think the Court can hold that
13:29:30 10 absentee ballots are permitted for this group of people. I
13:29:34 11 absolutely think that, and I think that because no Delaware
13:29:39 12 Court or statute has permitted it to date. There's no
13:29:44 13 prohibition to that and I think that's why we're here.

13:29:54 14 *Albence v. Higgin*, I think is kind of where I
13:29:56 15 want to start with, because this is the catalyst that the
13:29:58 16 plaintiffs argue is the reason that this court -- that this
13:30:02 17 court is considering the case.

13:30:05 18 In the summer of 2022, Delaware enacted a new
13:30:08 19 statute, the vote-by-mail statute. It became subject of a
13:30:13 20 lawsuit. When the supreme court looked at it in *Albence v.*
13:30:20 21 *Higgin*, the extrapolated opinion in December of 2022 looked
13:30:24 22 at the entire history of the constitution, reviewed for
13:30:29 23 pages what Delaware has done with the Delaware constitution,
13:30:33 24 reviewing it, amending it, et cetera, And in it's full
13:30:37 25 written opinion, the court determined -- and this is the

13:30:39 1 holding that the plaintiffs focused on. The categories for
13:30:42 2 absentee voting enumerated under Section 4A are exhaustive
13:30:46 3 and excluded the additional further categories absent
13:30:52 4 constitutional amendment. It's important to note that at
13:30:57 5 the page of the holding, 1093 and 1094, that holding is
13:31:03 6 adopted from the 1972 opinion of the justices. This is not
13:31:10 7 a new holding. It is lifted from 1972, placed in the 2022
13:31:16 8 decision. For there to be -- and I'll argue this again
13:31:20 9 later. Maybe I don't need to. For there to be an argument
13:31:23 10 now that this December 2022 case is a new holding and we've
13:31:29 11 got to get this before the federal district court for a
13:31:33 12 primarily injunction is just not based in the law. The
13:31:37 13 ultimate holding of the *Higgin* decision, like I said, is
13:31:40 14 that the vote-by-mail statute is unconstitutional.

13:31:43 15 THE COURT: And the vote-by-mail statute is a
13:31:46 16 different statute than the statute we're talking about here,
13:31:49 17 right?

13:31:50 18 MS. KELLY: That's correct.

13:31:51 19 THE COURT: The statute here is the person is
13:31:52 20 eligible to vote by absentee ballot.

13:31:55 21 MS. KELLY: Is that the --

13:31:57 22 THE COURT: 502.

13:32:03 23 MS. KELLY: Absentee -- the absentee voting
13:32:06 24 statute is -- the absentee voting statute is not at issue in
13:32:12 25 this case, Your Honor. I think the policy of the Delaware

13:32:15 1 Department of Elections in conjunction with the *Higgin*
13:32:21 2 decision is what's being questioned by plaintiff, if I
13:32:24 3 understand the argument presented today. I don't believe
13:32:28 4 that the absentee statute is at issue today. I know that
13:32:36 5 *Albence v. Manella* is challenging permanent absentee voting,
13:32:39 6 but that's ongoing in the Delaware supreme court at this
13:32:42 7 time.

13:32:42 8 THE COURT: So let me just -- because I want to
13:32:45 9 understand exactly what the State's positions. The Delaware
13:32:48 10 Supreme Court says that the Delaware constitution says that
13:32:51 11 certain categories of people are allowed to vote by absentee
13:32:55 12 ballot and that Delaware legislature can pass laws to
13:33:02 13 facility that, right?

13:33:04 14 MS. KELLY: Correct.

13:33:05 15 THE COURT: And the Delaware legislature has
13:33:07 16 passed a law saying that people can vote by absentee ballot
13:33:10 17 and its got a list of people that tracks, but not exactly,
13:33:14 18 the list that's in the constitution. It doesn't say
13:33:19 19 anything expressly about people who are incarcerated, but
13:33:25 20 otherwise eligible to vote. But the executive branch of the
13:33:31 21 Delaware government has always interpreted that absentee
13:33:36 22 ballot statute to include prisoners, either under the
13:33:39 23 business and occupation exception or the disability
13:33:44 24 exception. That's fair?

13:33:46 25 MS. KELLY: That's correct.

13:33:54 1 Your Honor, I would like to start with the
13:34:00 2 Pullman Abstention Doctrine. As the Court is aware, the
13:34:03 3 Abstention Doctrine applies the principles of federalism and
13:34:07 4 allows the state courts to decide state law issues. If I
13:34:15 5 understood my peer's argument today, I understood that he
13:34:19 6 conceded under *O'Brien* that this issue is more properly
13:34:24 7 decided by the Delaware Supreme Court. I could have
13:34:28 8 misunderstood his statement, but I understood him to say
13:34:33 9 that a Delaware constitutional issue is more properly
13:34:36 10 decided by the Delaware Supreme Court.

13:34:37 11 THE COURT: Let me ask you that. They said they
13:34:40 12 were unaware of any cases that were challenging this. Is
13:34:45 13 the State aware of any cases challenging whether or not
13:34:48 14 incarcerated individuals can vote by absentee ballot?

13:34:54 15 MS. KELLY: I am not aware. Your Honor, I think
13:34:56 16 this is the case of a first impression, as I've stated.

13:34:59 17 THE COURT: Yeah. And I guess the reason why
13:35:01 18 I'm wondering is, a lot times when we here Pullman, maybe
13:35:05 19 this goes to standing as well. There's just some sort of
13:35:08 20 suggestion that something is going to kind of get worked out
13:35:11 21 in the state court and maybe the federal court shouldn't
13:35:14 22 jump in until the state court has a chance to say, yes, this
13:35:17 23 is what our state law means or this is what it doesn't mean
13:35:20 24 or somebody's actually being prosecuted or somebody's been
13:35:24 25 denied the right to fight. But here I'm abstaining for what

13:35:28 1 if there's nothing going on?

13:35:31 2 MS. KELLY: Well, I think -- there is no
13:35:36 3 challenge at the moment with regard -- I really view this
13:35:41 4 case to be a challenge of the department's policies and the
13:35:45 5 department's interpretation of the constitution. This is
13:35:49 6 not a case where the state agency is saying no, you don't
13:35:52 7 have the right to vote. We're giving what we think is
13:35:56 8 proper given the constitutional right to vote. So I'm not
13:36:01 9 aware of any ongoing or pending anything, any challenges to
13:36:07 10 the department's policy to allow these voters to vote
13:36:10 11 absentee.

13:36:12 12 THE COURT: Would you agree -- if the Delaware
13:36:16 13 Supreme Court said yeah, the Delaware constitution, when it
13:36:20 14 says business or occupation, that includes people who are
13:36:25 15 incarcerated, if they said that, then this case would be
13:36:28 16 over, right?

13:36:29 17 MS. KELLY: A hundred percent.

13:36:31 18 THE COURT: Should we just ask them? There's a
13:36:37 19 method by which we can do that.

13:36:39 20 MS. KELLY: I actually didn't know that, Your
13:36:41 21 Honor. I'm sorry. I had no idea.

13:36:47 22 THE COURT: Yeah.

23 MS. KELLY: Is that a certified --

13:36:47 24 THE COURT: Certified question of law.

13:36:47 25 MS. KELLY: Right. I have --

13:36:52 1 THE COURT: I mean, maybe there's an strategic
13:36:55 2 reason one side or the other might not want to do that. And
13:36:58 3 I can think of reasons why that might be, but maybe you
13:37:01 4 don't have such a reason.

13:37:02 5 MS. KELLY: I don't think that option has been
13:37:04 6 explored by either side and if the other side has explored
13:37:07 7 it, I'm not aware of it. There's not been discussion
13:37:11 8 between the parties about that.

13:37:12 9 THE COURT: Let me ask you this. Similar to
13:37:15 10 your Pullman Abstention argument, is there a procedure --
13:37:17 11 now I will demonstrate my lack of knowledge about state
13:37:21 12 procedural law. Is there a procedure by which the plaintiff
13:37:24 13 like the plaintiff we have here today could go to the state
13:37:26 14 court and seek a judgment about whether or not the
13:37:30 15 declaratory judgment or a declaration or something about
13:37:33 16 whether or not prisoner absentee voting is constitutional?

13:37:37 17 MS. KELLY: I think certainly in this chancery
13:37:41 18 court there is the same avenue that is before the Court
13:37:46 19 today. It's a primary injunction in chancery court to
13:37:50 20 determine constitutionality of the practice of the
13:37:55 21 Department of Election. So absolutely.

13:37:59 22 THE COURT: Okay.

13:38:05 23 MS. KELLY: I think the Court is already aware
13:38:16 24 of the other elements and factors it needs to consider under
13:38:22 25 the Pullman Abstention Doctrine.

1 I think I would note, the final point I'd make
2 on the Pullman Abstention Doctrine and why the defendants
3 believe it's appropriate here. The reply brief mentions
4 that the Abstention Doctrine should not be applied to voting
5 rights cases and I think the third case they cite goes *CY*
6 *Development vs. City of Redlands*, but that case actually
7 says that there is no per se civil rights violation
8 exception to the Abstention Doctrine. So to the extent the
9 Court was not inclined to use that doctrine in this case
10 with regard to voting rights, I don't -- I think the case
11 law is pretty clear that the Court is free to use that
12 doctrine here.

13 Turning to the preliminary injunction, the
14 merits of the argument and the likelihood of success on the
15 merits, the plaintiff lacks standing here because there is
16 no evidence or affidavit from a member of the organization
17 demonstrating a direct effect. There is, attached to the
18 reply brief, an attorney affidavit that says that PLAN
19 understands that some members in the DDOC facility harbor
20 concerns about their ability to the cast absentee ballots
21 and the repercussions they face if they attempt to do so.
22 This assertion is a concern from the attorney -- well, I'm
23 sorry. A concern from the members signing an affidavit
24 through their attorney. It's not the affidavit that's
25 required for harm. And really we don't have evidence in the

13:40:13 1 case of that -- of any harm. In fact, the incarcerated --
13:40:22 2 eligible incarcerated people are provided the right to vote.

13:40:27 3 With regard to the *Anderson* verdict sliding
13:40:32 4 scale test that was discussed earlier, it's the State's
13:40:36 5 position that is a flexible test because there's no denial
13:40:41 6 of the right to vote. It is a -- it is not a severe burden
13:40:46 7 to the plaintiffs. It's -- because they're granted the
13:40:52 8 right to vote, there is very little burden to the plaintiffs
13:40:57 9 here. And the lesser standard should apply. The State's
13:41:02 10 legitimate state interest is the resources of, as I stated
13:41:07 11 before, the million dollars per election. That certainly
13:41:12 12 outweighs any minimal burden to the plaintiffs in this case.

13:41:21 13 I wanted to talk briefly about the equal
13:41:25 14 protection violation that's alleged essentially and the
13:41:29 15 reason why we are before the federal district court.
13:41:33 16 According to the briefing, equal protection rights are
13:41:38 17 violated because those who are awaiting trial in DOC custody
13:41:42 18 cannot vote while others who are awaiting trial outside of
13:41:47 19 DOC custody can vote. The difference, according to the
13:41:52 20 plaintiff, is that between those two groups of individuals
13:41:55 21 there's an invalid wealth classification because the people
13:41:58 22 who are incarcerated cannot post bail. The argument also
13:42:02 23 flawed for two reasons. It assumes that the only factor is
13:42:08 24 wealth and that's why they're incarcerated. That's not what
13:42:12 25 the bail analysis requires under Delaware law. Two of the

13:42:17 1 most important factors under Delaware law is safety of the
13:42:22 2 community and risk of flight. None of the factors deal with
13:42:26 3 wealth.

13:42:27 4 And also the second reason that it's flawed is a
13:42:32 5 court's bail analysis has nothing to do with the Department
13:42:36 6 of Elections' policies. To the extent there is some
13:42:43 7 differentiation based on wealth, which is not agreed, but to
13:42:48 8 that extent, it's not because of DOE policies, it's, if
13:42:51 9 anything, based on the bail analysis, which again, we don't
13:42:56 10 agree to. So from the defendant's perspective, there is no
13:42:59 11 equal rights violation, there is no differentiation between
13:43:06 12 any group of people and for that reason the likelihood of
13:43:12 13 success on the merits of the equal protection argument would
13:43:16 14 not survive.

13:43:18 15 The second factor for the preliminary injunction
13:43:25 16 is irreparable harm. Again, I feel like a record here, they
13:43:31 17 have the right to vote. There is no irreparable harm here.
13:43:35 18 Any threat, again, is not imminent, because this law has
13:43:39 19 been, assuming that we're going to use the *Higgin* case to
13:43:42 20 say that the absentee voting is unconstitutional here, that
13:43:48 21 holding has been in effect for over 50 years and the
13:43:51 22 Department of Elections has been conducting voting this way
13:43:55 23 for over 40 years. There is no imminent threat.

13:44:02 24 And as the Court was questioning earlier, a
13:44:07 25 threat of prosecution, there is also no threat of

13:44:11 1 prosecution. The Court has stated and I think gets that the
13:44:16 2 attorney general certifies these absentee ballots and the
13:44:20 3 attorney general has also written a letter to plaintiff
13:44:23 4 saying we are not going to prosecute here.

13:44:25 5 THE COURT: When was that?

13:44:26 6 MS. KELLY: 2022.

13:44:28 7 THE COURT: Is the attorney general going to
13:44:30 8 prosecute incarcerated people for trying to vote in 2024?

13:44:35 9 MS. KELLY: I don't have a recent letter, but I
13:44:38 10 imagine that -- so to the Court's question, I don't have
13:44:42 11 anything of record, but I cannot imagine the position taken
13:44:47 12 in 2022 would be any different today.

13:44:50 13 THE COURT: So I guess the question is, can --
13:44:54 14 can't the attorney general just tell the Court that?
13:44:56 15 Wouldn't that make this a lot easier? Is there any reason
13:44:59 16 why the attorney general -- not agreeing -- I'm not asking
13:45:03 17 for the attorney general to say I'm never going to prosecute
13:45:07 18 anyone for voter fraud, but I think it's not that big of an
13:45:11 19 ask to say shouldn't we have an official statement that we
13:45:15 20 are not going to prosecute eligible voters, eligible
13:45:22 21 incarcerated voters who try to vote by absentee ballot? I
13:45:32 22 can't imagine how that could be prosecuted. I can't imagine
13:45:35 23 it, but can't we just have you say that you won't try?

13:45:39 24 MS. KELLY: So I'm looking at the letter from
13:45:42 25 from November 2022, and I'm hesitating because it was a

13:45:55 1 letter from the attorney general to Mr. Bensing saying that
13:46:00 2 this office will not prosecute eligible individuals
13:46:03 3 incarcerated in the DDOC facilities for voting or attempting
13:46:07 4 to vote by absentee ballot in the 2022 general election.
13:46:11 5 It's limiting to the 2022 election, but I agree with that
13:46:15 6 that, but I can't imagine that if I made a phone call right
13:46:20 7 now I would be representing anything different. But I
13:46:23 8 certainly, that's not something that I did check before I
13:46:26 9 came in to court.

13:46:27 10 THE COURT: That might be one of those things
13:46:29 11 that if we had that as evidence of record that that may
13:46:32 12 weigh on how the Court moves forward here.

13:46:37 13 Okay.

13:46:42 14 MS. KELLY: Those are all the arguments that I
13:46:45 15 wanted to highlight for the Court. Again, the defendants
13:46:49 16 ask that the Court either abstain or deny the preliminary
13:46:54 17 injunction because plaintiffs have not met their burden
13:46:58 18 here.

13:46:58 19 Thank you, Your Honor.

13:46:59 20 THE COURT: Okay. Thank you very much.

13:47:13 21 MR. BERNSTEIN: Thank you, Your Honor. If I
13:47:15 22 could just address a few points that were made.

13:47:18 23 I would start by saying it was suggested by the
13:47:22 24 defendants that we said this would be an issue better left
13:47:26 25 in state courts. That is not what we said.

13:47:29 1 THE COURT: I understand.

13:47:30 2 MR. BERNSTEIN: Okay. Just to be clear, there
13:47:32 3 was *O'Brien* that said that the state courts are the final
13:47:37 4 arbiters of what state law is.

13:47:38 5 THE COURT: I understand your position.

13:47:40 6 MR. BERNSTEIN: Okay. Understood.

13:47:41 7 So staying on *O'Brien*, the the equal protection
13:47:45 8 claim here, there's also, I think, a mischaracterization of
13:47:48 9 our argument that was made by defendants, in that it is not
13:47:52 10 the fact that individuals have to pay bail that is the issue
13:47:56 11 here, it is the fact that you have two perfectly similarly
13:48:00 12 situated individuals, they're being accused of having
13:48:03 13 committed the same crime, the same factors go into their
13:48:06 14 bail analysis and one has a little more money in its bank
13:48:09 15 account and is able to pay bail and the other one cannot.
13:48:13 16 That under Delaware law one would be allowed to cast --
13:48:17 17 sorry. One would have a constitutional means of casting a
13:48:19 18 ballot and the other would have no means. It is an open and
13:48:22 19 shut violation of *O'Brien*, which stands for the proposition
13:48:25 20 that your physical location as than eligible incarcerated
13:48:29 21 voter can't be what your right to vote turns on.

13:48:33 22 THE COURT: So in *O'Brien* the state law was what
13:48:39 23 it was in terms of who could vote. If the state here is
13:48:44 24 correct that the Delaware constitution doesn't bar
13:48:49 25 incarcerated individuals from casting an absentee ballot,

13:48:52 1 that is dispositive of your equal protection claim, is that
13:48:56 2 right? That claims goes away.

13:48:58 3 MR. BERNSTEIN: Your Honor, the state doesn't
13:49:00 4 get to decide what the Delaware constitution says.

13:49:03 5 THE COURT: But the law is what it is. If the
13:49:06 6 law is -- you are taking as a given that it is illegal for
13:49:10 7 incarcerated people to cast absentee ballots. You are
13:49:14 8 taking that as a given. If that's wrong, though, you have
13:49:17 9 no equal protection claim.

13:49:20 10 MR. BERNSTEIN: Your Honor, while that is the
13:49:25 11 case, it is also very clearly the case under the *Higgin*
13:49:30 12 decision that the Article V Section 4A categories have now
13:49:36 13 been construed such that eligible incarcerated voters are
13:49:41 14 not eligible to cast these absentee ballots.

13:49:43 15 THE COURT: Well, that is an interpretation you
13:49:45 16 have of the *Higgin* decision. The *Higgin* decision was
13:49:48 17 assessing the vote-by-mail statute, not the absentee ballot
13:49:52 18 statute, right?

13:49:53 19 MR. BERNSTEIN: Your Honor, the *Higgin* decision
13:49:58 20 analyzed Article V Section 4A of the Delaware constitution.
13:50:01 21 That was with regard to analyzing whether the vote-by-mail
13:50:05 22 statute was constitutional, but their pronouncement
13:50:08 23 regarding what Article V Section 4A means can't be ignored.
13:50:13 24 It is the state court coming out with a definitive ruling
13:50:17 25 expressing what Article V Section 4A is. The defendants try

13:50:22 1 to cast this as a long-standing holding that was not new,
13:50:26 2 but it certainly was new. If it was understood to be the
13:50:30 3 holding, it certainly caught those who thought the
13:50:34 4 vote-by-mail law was constitutional off guard.

13:50:36 5 THE COURT: Maybe they didn't, but I get what
13:50:38 6 you're saying. But the holding was that you can't cast an
13:50:42 7 absentee ballot unless you've got an excuse by reason of
13:50:46 8 your business or occupation or you're disabled or some other
13:50:50 9 categories, but the Delaware Supreme Court did not assess
13:50:53 10 what it means to be not able to vote based on business or
13:50:58 11 occupation or disabled. It was not construing what those
13:51:02 12 things mean, right, and it never has?

13:51:06 13 MR. BERNSTEIN: It has ruled that those
13:51:09 14 categories are exhaustive, that they cannot be enlarged or
13:51:13 15 expanded upon.

13:51:13 16 THE COURT: Right. Can't be enlarged, but it
13:51:16 17 hasn't ruled on what their scope is, though.

13:51:22 18 MR. BERNSTEIN: Your Honor, I believe that
13:51:26 19 there's not a distinction there. What they've ruled upon is
13:51:31 20 it's the plain meaning of those statutes. Finding any
13:51:35 21 subcategory or any non-enumerated category that falls within
13:51:39 22 those exceptions would be expanding the category.

13:51:43 23 THE COURT: Let me ask you this. Why don't we
13:51:46 24 just ask them, then? Do you have an objection to that?

13:51:49 25 MR. BERNSTEIN: Yes, Your Honor. We've looked

13:51:51 1 into the certification issue. My understanding -- our
13:51:55 2 understanding regarding the certification is that it would
13:51:57 3 be similarly inappropriate here. One very similar factor in
13:52:03 4 the certification analysis to here is the clarity of the law
13:52:06 5 at issue. And here, as we've stated in our brief and for
13:52:10 6 the reason you've read in our briefing, we do not believe
13:52:13 7 that there is an uncertain issue of state law here. There
13:52:16 8 are judicial economy concerns, they're the same concerns
13:52:19 9 regarding the immediacy of the election. All of those
13:52:23 10 considerations weigh against certification here. And it
13:52:26 11 also is similar to abstention and similar to what I was
13:52:33 12 talking about in *O'Brien* previously, asking the state court
13:52:36 13 to reiterate what they've already said. We've --

13:52:40 14 THE COURT: Yeah. No, I didn't mean to
13:52:41 15 interrupt you. It is sort of an ironic position that you're
13:52:46 16 in, where the right that you're asserting is the right to
13:52:50 17 vote and the state says nobody is being denied it and you
13:52:53 18 think it's so clear you have been denied it that you don't
13:52:56 19 want me to ask the Delaware Supreme Court to confirm that.
13:52:59 20 There's sort of an irony in that, but you don't have to
13:53:02 21 comment on it if you don't want to.

13:53:05 22 MR. BERNSTEIN: Your Honor, I would just add to
13:53:11 23 the -- what is happening here is that our -- the people who
13:53:14 24 are incarcerated who wish to vote who have the *Higgin*
13:53:19 25 opinion and can see Delaware laws about challenges to

absentee ballots to prosecutions, they're being asked to shoulder a very severe burden if they want to try to exercise the right to vote through the mechanism given to them by the State. In the interest of giving them clarity as soon as possible, abstention is an appropriate -- as you've said, Your Honor, there's nothing going on in the state courts that would -- that indicates that there is any uncertainty here. And additionally, those voters need clarity as soon as possible.

I would also just like to, on the *Anderson* verdict analysis and address some points that were made by defendants. Defendants cited a \$1 million cost estimate. My understanding is that cost estimate was made with early voting baked in and as it currently stands, there is no early voting in Delaware. If my understanding of the cost is correct, over 75% of the costs were solely attributable to the days the polling places would have to be open during early voting, based on my understanding of what the state put forward. That would bring the administrative burden down, by my understanding of defendants math, to around \$140,000. This is a minimal administrative burden and under the *Anderson* verdict analysis, far more substantial administrative costs and burdens have been ordered by courts in cases where there's a total denial of the right to vote as there is here. There are also speculative concerns

13:55:00 1 raised by the State in the briefing regarding the burden
13:55:03 2 under Anderson verdict. And the *Padilla* case, which we
13:55:07 3 cite, makes it clear that the speculative concerns are
13:55:10 4 certainly not enough. And in particular, speculative
13:55:13 5 concern I'm responding to here is the concern of poll worker
13:55:18 6 recruitment. The State, in the declaration of Commissioner
13:55:25 7 Albence, spoke about anticipation of difficulty recruiting
13:55:28 8 pole workers. That is pure speculation at this point,
13:55:30 9 especially in a scenario without early voting whether there
13:55:34 10 would be more poll workers to go around presumably.

13:55:39 11 I would like to round this out, Your Honor, just
13:55:43 12 by reiterating that what the State is currently offering to
13:55:49 13 eligible incarcerated voters doesn't mean anything if it
13:55:52 14 contradicts the plain language of the state supreme court
13:55:55 15 holding. The state supreme court has the authority to say
13:55:59 16 what the law is and any Delaware voter who is incarcerated
13:56:04 17 who is given an absentee ballot and put in a position where
13:56:07 18 they have to understand that they are checking a box that
13:56:11 19 says my incarceration is a business or occupation,
13:56:15 20 considering that and considering the *Higgin* opinion and
13:56:18 21 considering the applicable criminal statutes, it is clear
13:56:21 22 that their right to vote is severely burdened, that they are
13:56:25 23 facing a chilling effect due to the fact that their vote
13:56:30 24 might not get counted, the fact that they might have their
13:56:34 25 vote challenged, the fact prosecution is even a possibility.

13:56:37 1 Thank you, Your Honor.

13:56:38 2 THE COURT: Thank you very much.

13:56:46 3 All right. Before I leave the bench there's
13:56:48 4 just a couple comments I had.

13:56:50 5 The first is that I have a real concern that the
13:56:59 6 plaintiff lacks standing, not because it doesn't have a
13:57:05 7 member that wants to vote. I'm going to assume for purposes
13:57:08 8 of the analysis that that's true. I have concern about the
13:57:14 9 imminent injury requirement and I have a concern about the
13:57:18 10 redressability requirement and I have a concern about
13:57:24 11 ripeness.

13:57:24 12 Those are my main concerns.

13:57:26 13 And I know that wasn't raised by the state, but
13:57:30 14 because these things go to the Court's subject matter
13:57:34 15 jurisdiction, I think I have an obligation to raise them if
13:57:37 16 I think there's a question. And so in all likelihood, I
13:57:43 17 will be asking for supplemental briefing on the issue of
13:57:46 18 constitutional standing. We had some discussion today about
13:57:59 19 whether it's clear as a matter of Delaware state law that
13:58:04 20 prisoner absentee voting violates the Delaware constitution.
13:58:13 21 And I was certainly hearing from the plaintiff that it's
13:58:18 22 clear that it's not allowed, but I was hearing from the
13:58:23 23 defendants that they have interpreted it as being permitted.
13:58:27 24 And so it's hard to say in this type of a situation that it
13:58:31 25 isn't ambiguous, and so one possibility, when the federal

1 court is confronted with a situation is to certify the
2 question for the state supreme court. So if the parties are
3 asked and we'll think about whether or not that's something
4 we want to hear from the parties about, we may ask to have
5 you meet and confer, if we determine that there is standing,
6 about what question we might certify to the Delaware supreme
7 court. And we can ask for that on an expedited basis.

8 The other comment I wanted to make was that
9 these concepts are really very challenging and I was so
10 impressed with the skill of counsel in their arguments today
11 in making it clear for the Court. Everyone was very very
12 well prepared. It's a pleasure hearing from all of you and
13 seeing familiar faces. I hope everybody has a great
14 weekend.

15 COURT CLERK: All rise.

16 (Court adjourned at 1:59 p.m.)

17
18
19
20
21 I hereby certify the foregoing is a true and
22 accurate transcript from my stenographic notes in the
23 proceedings.

23 /s/ Stacy M. Ingram, RPR
24 Official Court Reporter
25 U.S. District Court

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